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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1116

WILLIAM E. BUFALINO,
Petitioner,
v.
THE MICHIGAN BELL TELEPHONE COMPANY, FRANK KAMINSKI, ROBERT KOSS, HOLLIS BALLEW, ROBERT BULLOCK, ALBERT C. CARR, DINO CONSTANTINI, WILLIAM DePUGH, VICTOR DeWOLF (alias Victor Dukes), MARVIN GILLESPIE, HOWARD GLADUE, ALBERT C. LANGTRY, EARL MILLER, FRANK MONTANA, ALBERT NORMALI, WILLIAM NOSEWORTHY, GEORGE O'CONNOR, JACK D. PENLAND, VINCENT PIERSANTE, ARNOLD J. PINN, PAUL QUAGLIA, BILLIE STARKS and Does, One to Thirty-One Inclusive,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MICHIGAN BELL TELEPHONE COMPANY AND ITS EMPLOYEES

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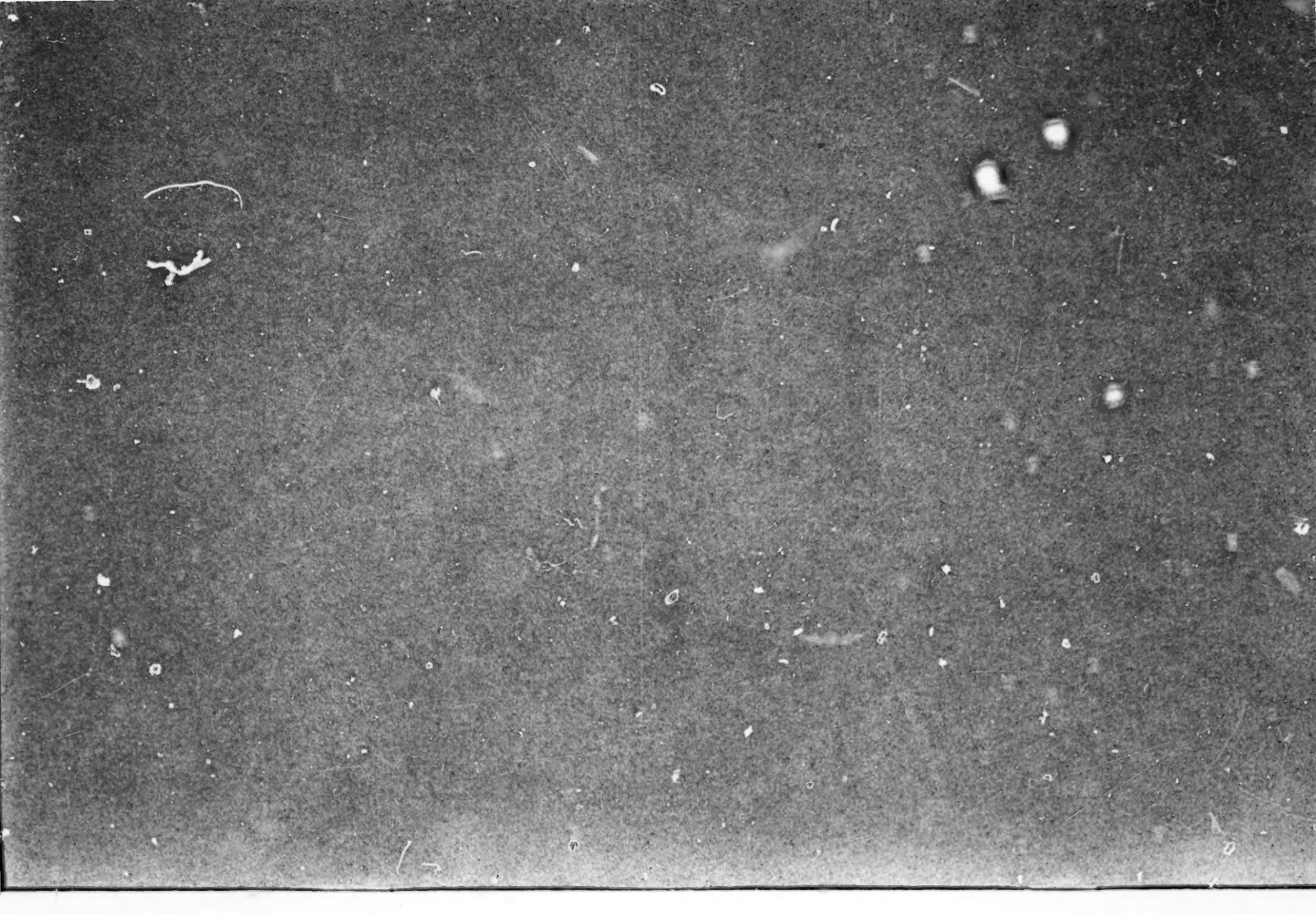

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This brief in opposition is filed on behalf of Respondents Michigan Bell Telephone Company and its employees Frank Kaminski, Robert Koss, Albert C. Carr, Albert C. Langtry,

Jack D. Penland and Arnold J. Pinn (herein called "Respondents").

The decision below does not merit certiorari. No novel or important questions of legal principle are involved. The issue is uniquely narrow and the factual situation is peculiar to Petitioner. There is no conflict with any decision of this Court or the decisions of other circuits. Both procedurally and substantively the Courts below were clearly correct in their disposition of the case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App. A of Petition) is reported at 404 F.2d 1023.

JURISDICTION

The jurisdictional requisites are set forth in the Petition but it should be noted that there was no diversity of citizenship and jurisdiction was dependent solely on claimed violation of federal statutes.

QUESTIONS PRESENTED

I.

Where two employees of a public utility, which has the duty to provide and maintain telephone facilities, are engaged in transferring a customer's line from one cable pair to another, and to accomplish and test the work a test desk employee originates calls to the customer over the line to which the field employee is connected with the knowledge of the test desk employee, and the resulting conversations are divulged only to the utility, first by the

customer and thereafter by the employees pursuant to the customer's complaints and request that the utility investigate the calls, is any federal question presented under the Communications Act (48 Stat. 1103; 47 U.S.C. Section 605), the Civil Rights Acts (R.S.§ 1979; 42 U.S.C. Section 1983), or the Civil Rights Act of 1957 (62 Stat. 932; 28 U.S.C. Section 1343)?

II.

Where there is no diversity of citizenship and plaintiff's complaint, amended complaint, discovery depositions and affidavits fail to present any federal question, should the federal court abstain from determining the non-federal questions alleged?

STATEMENT

Other than the claims against Respondents Carr, Langtry, Penland and Pinn first asserted by the amended complaints and clearly barred by the Michigan statute of limitations (App. A pp. 40-42),[1] Petitioner's claims are against Respondents Michigan Bell, Kaminski and Koss and are admittedly limited to the events of June 10 and 11, 1965 (App. A pp 38; 58b, 66b, 70-76b). These claims arose out of the performance of necessary work by Kaminski and Koss in the transfer of lines in a cable in accordance with a transfer sheet prepared by the assignment department of Michigan Bell.

On June 10, 1965 Kaminski was a test desk employee in the district office (24b) and Koss a cable splicer in the

[1] "App. A" and "App. B" refers to Petitioner's appendices. "a" or "b" refer to Appellant's or Appellees' Appendices respectively filed in the Court of Appeals.

field (App. A. pp. 38, 29b, 40b); Kaminski and Koss encountered difficulty in transferring a certain line due to an error in the transfer sheet. To obtain the unknown telephone number of this line and to expedite solution of the difficulty, Koss, following usual procedures, made a connection at the cable box in the field between the line and the test desk so that Kaminski could ring out on the line, which he did (App. A pp. 38, 25a, 30a, 18b, 20b, 25-27b, 30b, 48b). Kaminski knew that Koss, who had established the connection, was tied in on the line and he expected Koss to hear the conversation (App. A pp. 39, 18b, 20b, 29-30b, 36b). An unidentified woman (Mrs. Bufalino, Petitioner's wife) answered. Kaminski said he was a telephone employee, that work was being done on the line and that he was trying to straighten out the records. He asked for the number of the telephone involved. The woman refused to give it and some words were exchanged (App. A pp. 38, 18b, 25b, 48b). Kaminski and Koss exchanged some remarks over the line which were overheard by the woman (App. A pp. 38, 30b).

On June 11, 1965, Kaminski and Koss returned to their same work locations. Through the assignment department Kaminski located the "line card" for the line involved with the telephone number and the customer's name. He also received instructions on how to correct the error in the transfer sheet. The line was accordingly transferred by Koss at the cable box (App. A pp. 38-9, 26a, 28a, 21b, 39b, 43b). Then, following usual testing procedures, Kaminski called the number to verify that the line was working properly (App. A pp. 38, 28a, 19b, 21b, 35b, 39b, 43b). Kaminski connected Koss at the cable box so that Koss could hear and participate in the ensuing conversation (App. A. pp. 39, 19b 21b, 49b). The same woman answered

and refused to confirm the number or to identify herself as Mrs. Bufalino. She gave Kaminski a telephone number and asked him to call her husband (App. A pp. 39, 148a, 19b, 21b).

Keeping Koss connected to the line so that he could hear and participate in the conversation Kaminski dialed the husband's number and asked for Petitioner, Mr. Bufalino (26a, 19b, 21b, 31b-33b, 45b). After the call was answered and while waiting for Bufalino to come on the line Kaminski and Koss talked to each other over the line (19a-21a, 21b, 46b). Before revealing his own presence on the line Bufalino listened to and recorded conversation between Kaminski and Koss. Bufalino knew that two persons were on the line and that they were Kaminski and Koss, (App. A pp. 39, 19a-24a, 156a, 54b-56b).

Following his recorded telephone conversation with Kaminski and Koss, Bufalino twice called Michigan Bell representatives, complained that his telephone line was being "tapped" and demanded an investigation and action. He detailed his own and Mrs. Bufalino's conv rsations with Kaminski and Koss (153a-168a) and told the Company that "they'll admit to everything—everything I've told you, they'll admit to you" (App. A. pp. 39, 168a). Similarly, Mrs. Bufalino complained to a Michigan Bell representative and described her conversations with Kaminski and Koss. She was told that the matter would be investigated (51b-53b).

Immediately, pursuant to the Buffalino's complaints, an investigation was made by Michigan Bell; Kaminski and Koss were questioned and related their conversations with the Bufalinos and the circumstances (25a, 30a, 32a, 19b, 21b, 34b, 41b-42b, 50b). No other divulgence was involved (App. A p. 40).

The original complaint (2a-12a) filed July 12, 1965 named as defendants Michigan Bell, Kaminski and Koss, and "Does, one to fifty inclusive". The Does were never identified. The three named defendants filed answers (5b, 10b, 13b). For over a year there was extensive discovery during which fifteen depositions were taken (1b-2b), including those of Bufalino and his wife; defendants' records, documents, notes and memoranda were produced and copies were furnished to Bufalino (App. A pp. 36, 15a-16a). On October 20, 1966 defendants filed motion for summary judgment supported by the affidavits of Kaminski and Koss (17b-20b). Hearing on the motion began on October 31, 1966 and was completed on November 4, 1966. Petitioner admitted that his claims and proofs with respect to the moving parties were limited to the alleged interceptions on June 10 and 11, 1965 (App. A pp. 38, 58b, 66b, 70b-76b).

On January 20, 1967, before decision on the motion and pursuant to leave granted, an amended complaint was filed. Michigan Bell, Kaminski and Koss filed their "Renewal of Motion for Summary Judgment" (22b). A motion to dismiss was also filed on behalf of respondent employees Carr, Langtry, Penland and Pinn named in the amended complaint (23b). On March 20, 1967, a further hearing was had on all pending motions. By Memorandum Opinion and Order dated April 27 1967 (App. B) the District Court granted the motions for summary judgment and to dismiss. However, the "non-federal causes of action" were dismissed without prejudice (App. B p. 57).

The Court of Appeals affirmed as to respondents Michigan Bell and its employees.

ARGUMENT

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

The factual situation involved is unique to Petitioner. The controversy does not involve "wire tapping" or "intercept" of petitioner's telephone calls to or from third parties. To the contrary, it involves three calls originated by two telephone company employees working as a team, made directly to Petitioner and his wife, intercepted by no one, and divulged to no one except Petitioner and his wife and then to the Company by the employees pursuant to Petitioner's complaints and request that the Company investigate and take action.

The decision of the Court of Appeals does not involve any important question of federal law. To the contrary, the substance of the decision is that District Court was correct in ruling that the *undisputed facts* developed by fifteen months of extensive discovery showed that Petitioner did not have a claim upon which relief could be granted under federal law, whatever Petitioner's rights might be under state law. Although Petitioner is obviously dissatisfied with the application of the law to the facts of his particular case, it is abundantly clear that nothing of new legal significance is involved.

II.

THERE IS NO CONFLICT OF DECISION

Petitioner's claims of conflicting law are transparent. The decision of the Court of Appeals neither involved nor created any conflict as to applicable principles of law. It merely adopted and applied well defined principles to the particular facts of Petitioner's case.

Petitioner's assertion (Petition pp. 13-15) that the instant decision is in conflict with *Rathbun, Benanti* and *Griswold*[2] is simply incorrect. Whether both interception and divulgence are necessary elements of a cause of action under 47 U.S.C. §605 is a question not even posed by the established facts. The Court of Appeals held that *neither* element was present: no interception where the employees themselves originated calls necessary to perform their coordinated duties with the knowledge and consent of each other (App. A pp. 39-40);[3] no divulgence where Petitioner and his wife themselves divulged and the employees thereafter did so solely pursuant to Petitioner's request (App. A p. 40).

Nor is there any conflict as to the law of summary judgment. The Petition (pp. 21-2) cites decisions, including those of the Court of Appeals herein, to the effect that genuine disputed issues of fact cannot be decided upon summary judgment. Reference was omitted to the recent decision of this Court wherein Rule 56 was considered

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[2] *Rathbun v. United States*, 355 U.S. 107 (1957); *Benanti v. United States*, 355 U.S. 96 (1957); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[3] That the Court of Appeals found *implied* consent from the undisputed facts upon which the District Court found a dispute only as to *express* consent is certainly no basis for certiorari.

and interpreted. *First Nat. Bank v. Cities Service,* 391 U.S. 253 (1968). Petitioner does not, and cannot, claim that any conflicting rule was applied in these proceedings. At most, Petitioner's claim is that Rule 56 was incorrectly applied to the particular facts in his case. Patently it was not, but in any event the claim is no basis for certiorari.

Nor (Petition p. 32) is there conflict between the decision herein and decisions that federal courts should enforce "federally created rights of action". The decision herein is simply that the facts developed by extensive discovery show no violation of any such federally created rights.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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